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Mountain or Molehill?

Steven Baicker-McKee

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Mountain or Molehill?

Steven Baicker-McKee*

ABSTRACT

The 2015 amendments to the Federal Rules of Civil Procedure were the latest maneuver by the conservative Supreme Court to protect big corporations, and will result in a meaningful restriction of access to justice for individuals and those with limited means. Or, perhaps, they were nothing more than minor language tinkering that leaves judges free to continue their passive bystander approach to case management—tinkering that does little to curb the abusive discovery that leads defendants to make substantial settlement payments to resolve meritless cases simply to avoid exploding litigation costs. Stakeholders reading the same text and the same Advisory Committee Notes regarding the 2015 amendments forecast these polar, antithetical outcomes. So, who was right?

Data now exist to begin to understand how parties and courts are actually applying the amended provisions: the amendments have been in effect since December 1, 2015. The early results suggest a staggering change in the frequency with which parties and courts are applying proportionality to discovery requests to eliminate or narrow discovery not because it is irrelevant, but because it is too burdensome. Of course, the data do not reveal whether this change is permanent, and leave other questions unanswered, but they certainly suggest at least a short-term seismic shift in the application of proportionality. As to the other changes, the data are more mundane. This article presents the empirical data for all of the material 2015 amendments. It also describes some of the softer gloss and themes emerging from these opinions.

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I. INTRODUCTION

In 2010, two hundred judges, practitioners, and professors attended a conference at Duke University to discuss improvements to the pretrial process. They converged on three major deficits in our civil litigation system, and summarized them as follows: “What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management.”¹ To remedy these three deficits, various committees comprising the Judicial Conference of the United States drafted, and the Supreme Court ultimately proposed, extensive amendments to the Federal Rules of Civil Procedure, with a particular focus on the discovery rules.²

The proposed amendments sparked immediate and intense controversy. The committee received a torrent of comments during the public comment periods—over 2,300 written comments and

1. JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 4 (2010).

2. Specifically, the 2015 amendments altered the text of Rules 1, 4, 16, 26, 30–34, 37, and 55, and abrogated Rule 84 of the Federal Rules of Civil Procedure.

oral testimony from more than 120 witnesses.³ Some believed the amendments were just the latest move by the Supreme Court to protect big corporate defendants and limit plaintiffs' access to justice.⁴ Others believed the amendments did not go far enough in curbing disproportionate and abusive discovery.⁵

Coming before the effective date of the amendments, those wildly disparate assessments necessarily were purely speculative, without any empirical support. The amendments have now been in effect for more than a year,⁶ however, so it is now possible to begin evaluating the actual, not predicted, effects of the 2015 amendments. In other words, we can begin to assess who was right.

In order to explore whether the amendments have fostered change (positive or negative), this article compares the courts' application of the amended rules during the first year of their effectiveness to the courts' rulings during the same one year period immediately prior to their effectiveness. The article also examines some of the trends and sometimes surprising directions the courts have taken when applying these amendments.

For example, this article compares the courts' application of proportionality during the twelve-month period from December 2014 through November 2015 with the courts' application of proportionality during the twelve-month period from December 2015 through November 2016. By using parallel timeframes, confounding factors like seasonal differences should be minimized.

It is important to note at the outset that this analysis only examines judicial opinions applying the amended provisions, and does not attempt to capture behavior that is not reflected in such opinions. Thus, for example, it is possible (although some would

3. COMM. ON RULES OF PRACTICE & PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 14 (2014).

4. See, e.g., Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1086 (2015); Hon. Craig B. Shaffer, *The "Burdens" of Applying Proportionality*, 16 SEDONA CONF. J. 55, 69–70 (2015).

5. See, e.g., Mark W. Bennett, *Essay: The Grand Poobah and Gorillas in Our Midst: Enhancing Civil Justice in the Federal Courts—Swapping Discovery Procedures in the Federal Rules of Civil and Criminal Procedure and Other Reforms Like Trial by Agreement*, 15 NEV. L.J. 1293, 1313 (2015); Edward D. Cavanagh, *The 2015 Amendments to the Federal Rules of Civil Procedure: The Path to Meaningful Containment of Discovery Costs in Antitrust Litigation?*, 13–APR ANTITRUST SOURCE 1, 7 (2014).

6. These amendments apply to cases pending on December 1, 2015, unless the court "determines that applying them in a particular action would be infeasible or work an injustice." See FED. R. CIV. P. 86(a)(2)(B). Courts adjudicating motions on or after December 1, 2015, have generally applied the amended rules, so the existing data does effectively represent a full year's experience in the courts.

say unlikely) that parties have taken to heart the amendment to Rule 1 suggesting that they construe the rules to effectuate the just, speedy, and inexpensive determination of their cases and are now voluntarily participating in the litigation process in a more cooperative manner. Likewise, parties may be asserting proportionality objections to discovery in cases where neither party sees fit to bring the issue before the court (and thus that do not result in a judicial opinion to be tallied). Indeed, those two concepts might converge if, following a proportionality objection, the parties meet and confer, then cooperatively agree to a scope of discovery that is proportional to the needs of the case. That behavior, if occurring, would be difficult for an external observer to discern, and is outside the scope of this analysis. With that caveat in mind, judicial opinions are likely a good barometer for the behavior of the bar and bench generally on these procedural issues.

A few amendments particularly caught the attention of the lawyers, scholars, and other stakeholders. This article will focus on those controversial amendments, but will include all the provisions that the courts have applied substantively. It does not address two amendments designed to speed up the litigation process: the amendments to Rules 4⁷ and 16⁸ shortening the time periods for service of a complaint and issuance of the initial case management order. These are important amendments, but are straightforward and have not resulted in any surprising or interesting judicial opinions. Similarly, amendments to Rules 16⁹ and 26(f)¹⁰ added topics for the parties and the court to address at the outset of cases, such as preservation of electronically stored information. These amendments are helpful, but likewise have not generated any noteworthy opinions, and are not discussed in this article.

The main body of this article will examine one-by-one the most controversial of the 2015 amendments. For each amendment, the article will, after describing the nature of the amendment, provide the empirical comparison of the pre-amendment and post-amendment data. The article will next describe the judicial gloss that adds nuance and understanding not reflected in the raw numbers. The article will wrap up the treatment of each rule amendment with conclusions about the effectiveness, and effects, of the amendment and how it fits into the larger picture of the three Duke Conference objectives of promoting “cooperation and

7. FED. R. CIV. P. 4(m).

8. FED. R. CIV. P. 16(b)(2).

9. FED. R. CIV. P. 16(b)(3).

10. FED. R. CIV. P. 26(f)(3).

proportionality [and] sustained, active, hands-on judicial case management.” The article will conclude with an over-arching analysis of whether the amendments are achieving these Duke Conference objectives.

II. PROPORTIONALITY—RULE 26(B)(1)

A. *The Data*

Proportionality—the balancing of the benefits and burdens of discovery—appeared to generate the most anticipatory angst¹¹ and to have since achieved the greatest traction in the courts. Proportionality is not a new concept in the Federal Rules of Civil Procedure; proportionality has been in the rules since 1983.¹² Proportionality was initially situated in Rule 26(b)(1)—the provision establishing the scope of discovery—as a limitation on otherwise discoverable information.¹³ The Advisory Committee Notes reflect a concern about the cost of discovery, the prospect that these costs were driving settlement of claims, and the need for greater judicial involvement to police this excessively expensive discovery.¹⁴

The Supreme Court and the Advisory Committees did not perceive the insertion of proportionality into the Rules to have cured the problem of excessive discovery. Accordingly, the 1993 amendments moved the limits on discovery in Rule 26(b)(1), including proportionality, into a separate section of limits in Rule 26(b)(2).¹⁵ The 1993 amendment also expanded the list of factors the courts could consider in assessing proportionality.¹⁶

11. ADVISORY COMM. ON CIVIL RULES, REPORT OF THE DUKE CONFERENCE SUBCOMMITTEE 3 (2014) [hereinafter DUKE CONFERENCE REPORT] (“This proposed change provoked a stark division in the comments.”).

12. FED. R. CIV. P. 26(b)(1)(iii) (1983).

13. The initial iteration of proportionality read, “The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that . . . (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.” *Id.*

14. See FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1983 amendment (“The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent. The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.”).

15. See FED. R. CIV. P. 26(b) advisory committee’s note to 1993 amendment (“Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.”).

16. See FED. R. CIV. P. 26(b) advisory committee’s note to 2015 amendment (“The 1993 amendments added two factors to the considerations that bear on limiting discovery:

Still not satisfied, in 2000, the Supreme Court and the Advisory Committees sought to strengthen the limitations on discovery in Rule 26(b)(2), including proportionality, by adding a sentence to the scope of discovery in Rule 26(b)(1) to the effect that all discovery was subject to proportionality and the other limits in Rule 26(b)(2).¹⁷ The Advisory Committee Notes recognized that this new language was superfluous, and was only added because the courts did not seem to be applying the limitations rigorously enough.¹⁸

Coming full circle, the 2015 amendments repositioned proportionality from Rule 26(b)(2) back into Rule 26(b)(1), where it started.¹⁹ The Advisory Committee's articulated purpose of this relocation was, yet again, to foster more robust application of the doctrine.²⁰ The Committee was concerned that, by moving proportionality out of the definition of the scope of discovery in 1993, the committee had inadvertently deemphasized the provision.²¹ The amendment also reordered the proportionality factors, moving "the importance of the issues at stake in the action" to the front of the list, and adding consideration of "the parties' relative access to relevant information" to the list.²²

Some commentators worried that the broad scope of federal discovery would be eroded by proportionality objections.²³ Others

whether 'the burden or expense of the proposed discovery outweighs its likely benefit,' and 'the importance of the proposed discovery in resolving the issues.'").

17. See FED. R. CIV. P. 26(b) advisory committee's note to 2000 amendment.

18. See FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment ("[T]he Committee had been told repeatedly that courts were not using these limitations as originally intended. 'This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.'").

19. *Id.*

20. *Id.* ("Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that '[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.'").

21. *Id.* ("The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: '[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as limitations, no longer an integral part of the (b)(1) scope provisions.'"); DUKE CONFERENCE REPORT, *supra* note 11, at 6 ("The purpose of moving these factors explicitly into Rule 26(b)(1) is to make them more prominent, encouraging parties and courts alike to remember them and take them into account in pursuing discovery and deciding discovery disputes. If the expressions of concern reflect widespread disregard of principles that have been in the rules for thirty years, it is time to prompt widespread respect and implementation.").

22. DUKE CONFERENCE REPORT, *supra* note 11, at 7.

23. *Id.* at 3 ("Those who wrote and testified about experience representing plaintiffs saw proportionality as a new limit designed only to favor defendants. They criticized the

believed that moving proportionality would not cause a meaningful change in behavior or instill the balance missing from the discovery process.²⁴ Although the overall impact of the proportionality amendment on the federal civil justice system is not yet known, the initial data suggest that the repositioning may have fostered real change.

Three hundred thirty-five cases have applied the new proportionality provision in the first year of amended Rule 26(b)(1).²⁵ Of those cases, in 192 (57%) the court restricted discovery in whole or in part based on proportionality.²⁶ By comparison, courts applied proportionality 79 times and restricted discovery in 46 cases (58%) during the pre-amendment comparison period. These numbers suggest that parties and courts are applying proportionality more than four times more frequently than before the amendments, and that courts are narrowing discovery on proportionality grounds more than four times more frequently post-amendment.²⁷ Moreover, the data suggest that this increase in frequency may be accelerating—the final three months of the post-amendment period contained the highest levels of the application of proportionality—almost 40% higher than the average for the year.

factors from Rule 26(b)(2)(C)(iii) as subjective and so flexible as to defy any uniform application among different courts. They asserted that ‘proportionality’ will become a new automatic and blanket objection to all discovery requests, leading to increased motion practice with attendant costs and delays. And they were particularly concerned that proportionality would routinely defeat the rather extensive discovery ordinarily needed to prove many claims that involve modest amounts of money but principles important not only to the plaintiffs but also to the public interest.”).

24. See, e.g., DUKE CONFERENCE REPORT, *supra* note 11, at Tab 2B, 52 (“Moving the proportionality factors from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) ‘does not effect any substantive change in the scope of discovery.’ Rule 26(b)(1) now expressly invokes Rule 26(b)(2)(C) as a limit on all discovery.”).

25. Many cases recite the amended language in their general statement of discovery law. This analysis did not count a case as applying proportionality unless the court referenced the doctrine in its analysis or discussion of the discovery at issue.

26. The analysis for this metric started with whether the court restricted discovery in its ruling—so an opinion granting a motion to compel without limitation notwithstanding a proportionality objection would automatically be deemed one not restricting discovery based on proportionality. If the court’s ruling limited discovery, then closer analysis was necessary to determine whether proportionality (as opposed to relevance or some other consideration) was the basis for the restriction. While court opinions are not always models of clarity, and thus categorizing them often requires an exercise of judgment, this analysis attempted to use a consistent yardstick for the pre- and post-amendment periods.

27. A natural question is whether the courts’ docket size has changed over the past year. Although the U.S. Courts reports are not current enough to answer this question, the Justia Dockets and Filings website and the Judge Information Center run by Syracuse University both suggest that filings during the post-amendment year were down between three and five percent compared to the pre-amendment year, making the change, if anything, greater than the raw numbers suggest.

While it is difficult to deny the materiality of these numbers, the data leave many questions unanswered. For example, only time will tell whether this increased rate of application of proportionality will accelerate over time, persist at current levels, or return to pre-amendment levels as the amendments are less in the forefront of everyone's consciousness. Likewise, it is difficult to determine whether the courts are reaching a different *result* because of the increased application of proportionality, or whether they are reaching the same result for a different *reason*.

For example, a number of discovery rules address burdensome discovery. Rule 26(c) allows a court to issue a protective order protecting a party from "undue burden."²⁸ Similarly, Rule 26(b)(2)(C)(ii) instructs the court to limit discovery when the information can be obtained from a less burdensome source.²⁹ Thus, a court that viewed discovery as unduly burdensome prior to December 1, 2015, had the option to limit that discovery under three different provisions in Rule 26: Rule 26(c); Rule 26(b)(2)(C)(ii); or Rule 26(b)(2)(C)(iii) (where proportionality previously resided). Now, that court might reach the same decision arising out of the same concern about the burdensome nature of the discovery, but might be more likely to base its ruling on proportionality because that doctrine is in the spotlight. In other words, the outcome may not have changed and the reason for the outcome—the court's perception that the discovery is too burdensome—may not have changed, but the courts may more frequently be framing their decisions to narrow burdensome discovery under the proportionality rubric.³⁰

B. The Proportionality Judicial Gloss

In addition to the numerical increase in proportionality adjudications, the case law reveals some interesting judicial gloss on the repositioned proportionality doctrine. For example, consistent with the Advisory Committee Notes stating that the purpose of the amendment was to promote more robust application of propor-

28. FED. R. CIV. P. 26(c)(1).

29. FED. R. CIV. P. 26(b)(2)(C)(ii).

30. Indeed, case law reveals that the courts often conflate these different burdensome-oriented provisions, using the term "undue burden" in their proportionality analysis, even though that term appears only in other discovery provisions. See, e.g., *Small v. Amgen, Inc.*, No. 2:12-cv-476-FtM-29MRM, 2016 WL 7228863, at *7 (M.D. Fla. Sept. 28, 2016) ("[T]he Court finds that the proposed discovery is not proportional to the needs of this case. See Fed. R. Civ. P. 26(b)(1). Specifically, the Court finds that requiring Defendants to produce all discovery sought irrespective of the underlying indication would potentially impose an undue and unacceptable burden on the Defendants.").

tionality, and with the manner in which the courts have apparently taken this encouragement to heart, some courts are holding that they have an independent duty to assess proportionality, *even if the parties do not raise it*.³¹ This is a marked departure from the courts' general practices, and may reflect the Supreme Court's encouragement that judges take a more active, hands-on approach to case management.

Perhaps the most significant judicial gloss involves the manner of litigating a proportionality issue. The opinions are replete with statements from the courts announcing that the relocation of proportionality did not change the parties' respective burdens.³² Thus, the party resisting the discovery has the burden of proving that the discovery should not be allowed.³³ The change comes not in an overt shifting of this burden, but in the manner in which courts are requiring parties to support their positions regarding proportionality.

Numerous courts have held that parties must submit *evidence* to support their contentions regarding the proportionality factors, not just legal *argument*.³⁴ This requirement has converted many discovery motions from contests of legal argument to evidentiary proceedings, fundamentally changing the manner in which parties must litigate proportionality. Moreover, this requirement of evidentiary support applies to both the moving party and the opposing party—regardless of which party has the initial burden, the opposing party will simply lose if it does not counter the moving party's evidence with evidence of its own. Thus, both parties now must submit evidence supporting their positions on proportionality.³⁵

31. See, e.g., *Curtis v. Metro. Life Ins. Co.*, No. 3:15-cv-2328-B, 2016 WL 687164, at *3 (N.D. Tex. Feb. 19, 2016) (holding that a court must limit disproportionate discovery even in the absence of a motion); *Arcelormittal Ind. Harbor LLC v. Amex Nooter, LLC*, No. 2:15-CV-195-PRC, 2016 WL 614144, at *6-7 (N.D. Ind. Feb. 16, 2016).

32. See *Wilmington Tr. Co. v. AEP Generating Co.*, No. 2:13-CV-01213, 2016 WL 860693 (S.D. Ohio Mar. 7, 2016); *Curtis*, 2016 WL 687164, at *3.

33. *Wilmington Tr. Co.*, 2016 WL 860693, at *2; *Curtis*, 2016 WL 687164, at *3 (holding that a party that opposes a discovery request on the basis of proportionality must come forward with specific information, to the extent that such information is available, to address the proportionality factors).

34. See, e.g., *Gregory v. Gregory*, No. 2:15-CV-0320 (WHW)(CLW), 2016 WL 6122456, at *10 (D. N.J. Oct. 18, 2016) (finding that the plaintiff failed to submit evidence of the cost of responding, much less evidence that the cost would be "excessive or unwarranted"); *VHT, Inc. v. Zillow Grp., Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) ("[T]he dearth of evidence on the record supporting Zillow's position renders that information negligibly relevant, minimally important in resolving the issues, and unduly burdensome.").

35. See *Wilmington Tr. Co.*, 2016 WL 860693, at *2 ("Courts have, in evaluating the proportionality issue, suggested that both parties have some stake in addressing the vari-

C. The Proportionality Assessment

Chief Justice Roberts emphasized his belief that both parties and judges need to exercise “increased reliance on the common-sense concept of proportionality” in his 2015 Year-End Report on the Federal Judiciary.³⁶ Surprisingly, the simple movement of the existing proportionality clause from one subsection of Rule 26(b) to another, with virtually no alteration to the clause’s language, appears to be accomplishing Justice Roberts’s goal. Indeed, this repositioning—perhaps along with the encouragement of the Chief Justice—has had a greater effect than any of the other changes in the 2015 amendments. The fourfold increase in judicial opinions applying proportionality to restrict discovery is difficult to trivialize. Furthermore, the data suggest that the increased application of proportionality may be increasing over time—after a modest start immediately after the effective date of the amendments, the rate of application soared by almost 40% in the last quarter of the comparison year.

The effectiveness of the proportionality amendment is further demonstrated by the judges who concluded that they have an independent duty to assess the proportionality of discovery requests even if the parties do not raise the issue. While Rule 26 has imposed the duty on each court to limit inappropriate discovery “on motion *or on its own*,”³⁷ judges have rarely imposed discovery limits *sua sponte* in the past. Only time will tell whether these changes stick or whether proportionality gradually fades from the consciousness of the parties and the judges.

Proportionality was one of the three core needs of proportionality, cooperation, and active judicial case management to improve the civil litigation system identified at the Duke Conference, and it received the most pointedly specific mandate—amended Rule 26(b)(1) includes proportionality as a mandatory limitation on the scope of all discovery. The Supreme Court’s success at achieving greater proportionality largely hinges on the effectiveness of the amendment to Rule 26(b)(1), and at present, it appears that the

ous relevant factors.”); *Oracle Am., Inc. v. Google, Inc.*, No. 10-cv-03561-WHA (DMR), 2015 WL 7775243, at *2 (N.D. Cal. Dec. 3, 2015).

36. C.J. JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2015) (“The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case That assessment may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery.”).

37. FED. R. CIV. P. 26(b)(2)(C) (emphasis added).

Supreme Court has succeeded in advancing its proportionality goal.

III. SPOILIATION—RULE 37(E)

A. *The Data*

Spoilation sanctions have been a topic of much discussion over the past several years.³⁸ Prior to December 1, 2015, courts imposed sanctions for spoliation either through their general powers over cases on their dockets or, if they had entered a preservation order, through their sanctioning authority under Rule 37(b) for a violation of a discovery order.³⁹ The only provision in the Federal Rules of Civil Procedure explicitly touching on spoliation was Rule 37(e), which contained a narrow safe harbor for the destruction of electronically stored information (“ESI”) through the routine operation of a computer system.⁴⁰ As a consequence, courts were inconsistent regarding the standard for spoliation sanctions, with some courts imposing them for mere negligence⁴¹ and others requiring a heightened degree of misconduct.⁴²

New Rule 37(e) contains a national standard for spoliation of ESI. It establishes three prerequisites for any sanctions for spoliation of ESI: (1) the party failing to preserve the ESI must have had a duty to preserve it; (2) the ESI must have been “lost because the party failed to take reasonable steps to preserve” it (i.e., the ESI was lost through negligence, not a server being destroyed through flooding or a lightning strike); and (3) the ESI “cannot be restored or replaced through additional discovery.”⁴³ If all three prerequisites are satisfied, amended Rule 37(e) creates two tiers of sanctions. It only allows the most severe sanctions—dispositive sanctions (dismissal or judgment) or an adverse inference instruction to the jury—upon a finding of *intent* to deprive an opponent of the use of the lost evidence in the litigation.⁴⁴ Otherwise, sanc-

38. See, e.g., Tristan Evans-Wilent, Note, *The Electronic Document Retention System Ate My Homework: Gross Negligence and the Rebuttable Presumption of Prejudice Within the Doctrine of Spoliation in Federal Courts*, 87 ST. JOHN'S L. REV. 1193 (2013).

39. See, e.g., FED. R. CIV. P. 37(b); *Guard Ins. Grp., Inc. v. Techtronic Indus. Co.*, 80 F. Supp. 3d 497, 503 (W.D.N.Y. 2015).

40. See, e.g., *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1322 (10th Cir. 2011).

41. See, e.g., *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002) (authorizing the giving of adverse-inference instructions on a finding of negligence or gross negligence).

42. *Stepnes v. Ritschel*, 663 F.3d 952, 965 (8th Cir. 2011) (requiring bad faith); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010) (same).

43. FED. R. CIV. P. 37(e).

44. FED. R. CIV. P. 37(e)(2).

tions are limited to those necessary to cure prejudice to opposing parties, and may not include dispositive sanctions or an adverse inference instruction.⁴⁵

With this amendment to Rule 37(e), sanctions for spoliation of ESI will, by rule, become more uniform, and case law confirms that courts across the country are now consistently applying the same standard for spoliation sanctions related to ESI.⁴⁶ The open question is whether the amendment caused the frequency of the various sanctions to change.

Courts adjudicated 54 motions for sanctions in their first year of applying amended Rule 37(e).⁴⁷ The court awarded some sanction in 26 of those, 14 of which were an adverse inference instruction. During the comparison period, courts adjudicated 54 motions for spoliation sanctions, awarding sanctions in 27, 14 of which were an adverse inference instruction. These data suggest that, while the amendment to Rule 37(e) created a uniform standard for sanctions for spoliation of ESI, the amendment has not altered the overall frequency of requests for sanctions for spoliation of ESI, imposition of sanctions for spoliation of ESI, or the severity of sanctions for spoliation of ESI that the courts have imposed.

45. FED. R. CIV. P. 37(e)(1).

46. See, e.g., *Best Payphones, Inc. v. N.Y.C.*, No. 1-CV-3924 (JG)(VMS), 2016 WL 792396, at *4 (E.D.N.Y. Feb. 26, 2016) (recognizing that negligence or even gross negligence can no longer support an adverse inference instruction as a sanction for the spoliation of ESI). There are cases where courts continue to apply case law standards instead of Rule 37(e) to the failure to preserve ESI. See, e.g., *Bordegaray v. City of Santa Barbara*, No. 2:14-cv-8610-CAS (JPRx), 2016 WL 7260920, at *5-6 (C.D. Cal. Dec. 13, 2016) (applying older case law precedent instead of Rule 37(e) to spoliation of electronic data from a police car in an excessive force case); *Estate of Romain v. City of Grosse Pointe Farms*, No. 14-12289, 2016 WL 7664226, at *3 (E.D. Mich. Nov. 22, 2016) (applying older case law precedent instead of Rule 37(e) to spoliation of Google search images).

47. As originally framed, amended Rule 37(e) would have addressed spoliation sanctions for all forms of evidence, not just ESI. DUKE CONFERENCE REPORT, *supra* note 11, at 370-71. In response to comments that spoliation sanctions were uniquely problematic with ESI and that the current regime was working appropriately for spoliation of paper documents, the Advisory Committee revised the proposed amendment and limited its scope to spoliation of ESI. Accordingly, while the articulated purpose of the amendment was to promote a nationally-consistent standard, the Advisory Committee created an odd dichotomy where failure to preserve a paper copy of a letter is potentially subject to sanctions under a court-developed standard that varies from jurisdiction to jurisdiction and failure to preserve the same letter in electronic form is subject to an entirely separate set of considerations found in Rule 37(e). See *Best Payphones, Inc.*, 2016 WL 792396, at *4 (applying two different standards to allegations of failure to preserve ESI and non-ESI in the same case). Some courts have addressed this odd result by applying Rule 37(e) to spoliation of paper documents as well, even though it does not apply on its face. See *Mcqueen v. Aramark Corp.*, No. 2:15-CV-492-DAK-PMW, 2016 WL 6988820, at *3 (D. Utah Nov. 29, 2016) (applying 37(e) when both ESI and paper were lost). Because of the limitation in amended Rule 37(e) to ESI, this article compares cases under amended Rule 37(e) to cases in the comparison period addressing allegations of ESI spoliation, to keep the comparison “apples to apples.”

Thus, the data suggest that the amendment to Rule 37(e) had precisely the effect that the Advisory Committee advanced as its goal—to establish a uniform standard without either promoting or squelching spoliation sanctions.

B. The Spoliation Judicial Gloss

Although the 2015 amendments appear to have created greater uniformity in ESI spoliation sanctions without altering the frequency of these sanctions, the amendments have also yielded some unexpected developments in the case law applying them. As with proportionality, the nature of the showing that parties need to make to support or oppose a spoliation motion is evolving.

The threshold issue in this regard is which party has the burden of proof or persuasion as to the various prerequisites and considerations under Rule 37(e). Rule 37(e) is silent on the parties' burdens, and the Advisory Committee Notes suggest that the courts have discretion to assign burdens on a case-by-case basis.⁴⁸ Some courts are assigning the burden to the moving party, as would be typical of a spoliation motion prior to the amendments.⁴⁹ However, some courts are shifting the burden onto the nonmoving party to demonstrate the absence of prejudice.⁵⁰ Furthermore, some judges are instructing the parties to develop a more complete record when they deem the parties' submissions inadequate to make the findings required under Rule 37(e).⁵¹

48. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment ("The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.").

49. See, e.g., *Richard v. Inland Dredging Co.*, No. 6:15-0654, 2016 WL 5477750, at *4 (W.D. La. Sept. 29, 2016); *Martinez v. City of Chi.*, 2016 WL 3538823, at *24 (N.D. Ill. June 29, 2016).

50. See *Mcqueen*, 2016 WL 6988820, at *3 (holding that where the precise nature of lost documents cannot be determined, the party failing to preserve cannot show lack of prejudice).

51. See, e.g., *Gonzalez-Bermudez v. Abbott Labs. PR Inc.*, 214 F. Supp. 3d 130, 161-63 (D. P.R. 2016) ("Having not yet shown that she is entitled to an adverse inference, Plaintiff's request is **DENIED WITHOUT PREJUDICE**."); *Konica Minolta Bus. Sols., U.S.A. Inc. v. Lowery Corp.*, No. 15-CV-11254, 2016 WL 4537847, at *5-6 (E.D. Mich. Aug. 31, 2016) (holding that further discovery was required to determine whether reasonable steps were taken to preserve the ESI and whether the ESI can be replaced through additional discovery); *Bagley v. Yale Univ.*, No. 3:13-CV-1890 (CSH), 2016 WL 3264141, at *19 (D. Conn. June 14, 2016), *as amended* (June 15, 2016) (reserving a decision on the spoliation motion until the nonmovant defendant produced proof of its preservation efforts).

A related question is who decides whether the conditions in Rule 37(e) are satisfied—the judge or the jury? Rule 37(e) is again silent on who makes the determinations it requires, but the Advisory Committee Notes suggest that the judge has the option of sending issues like intent to the jury.⁵² Despite this implicit authority, judges have decided the vast majority of the post-2015 Rule 37(e) motions.

In *Cahill v. Dart*,⁵³ however, the judge allowed the jury to decide whether the spoliating party had the intent to affect the litigation as part of the Rule 37(e) analysis. The judge was concerned that the finding of intent to destroy the evidence was closely related to the plaintiffs' claims for false arrest and malicious prosecution. Accordingly, the judge wrote that, "the best course is for the jury to decide the question of intent."⁵⁴ Although the judge did not explicitly reference the Seventh Amendment, this case highlights one important consideration in deciding whether to involve the jury in the Rule 37(e) determinations.

The courts are also divided on the extent to which any sanctioning authority outside of Rule 37(e) remains for spoliation of ESI.⁵⁵ Historically, courts used either their inherent powers over cases on their docket or, if they had issued a preservation order with which a party failed to comply, their authority under Rule 37(b) to sanction parties for failing to comply with discovery orders.⁵⁶ Thus, the question is whether either of these sources remains available following the amendment of Rule 37(e).

Regarding whether courts may continue to use their inherent authority to sanction parties for spoliation of ESI, some courts have held that Rule 37(e) forecloses the exercise of that inherent authority.⁵⁷ Other courts deem the remedy in Rule 37(e) cumula-

52. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment ("If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.").

53. No. 13-cv-361, 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016).

54. *Id.* at *4.

55. The Advisory Committee Notes to the 2015 amendment to Rule 37(e) state that the new provision "does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim." This article focuses on spoliation sanctions within the existing litigation, rather than such independent tort claims.

56. See *McIntosh v. United States*, No. 14-CV-7889 (KMK), 2016 WL 1274585, at *30 (S.D.N.Y. Mar. 31, 2016).

57. See *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 740 (N.D. Ala. 2017) (holding that the Advisory Committee Notes foreclose reliance on the court's inherent authority); *Marshall v. Dentfirst, P.C.*, 313 F.R.D. 691, 694 (N.D. Ga. 2016) ("This amendment

tive to other sanctioning authorities.⁵⁸ Cases falling in this latter category appear to be in direct conflict with the Advisory Committee Notes,⁵⁹ and may disappear over time, but for now this remains an open issue.

Whether courts may impose the sanctions in Rule 37(b) if they have issued a preservation order remains unanswered. This is an important question. Rule 37(b) not only contains a lengthy list of approved sanctions, it also accords the courts almost complete discretion to combine the sanctions on the list or to impose any other sanctions they deem “just.”⁶⁰ Thus, the potential to use Rule 37(b) to expand the sanctions criteria and options beyond those authorized under Rule 37(e) could significantly undermine the policy objective behind the 2015 amendments to Rule 37(e) to create a uniform and predictable standard for ESI spoliation sanctions.

Case law also raises some anomalies that the Advisory Committee may not have intended to create, and may want to remedy. First, all of the other sanctioning authorities in Rule 37 provide for the award of attorney’s fees to the prevailing party in a discovery motion.⁶¹ Rule 37(e) contains no provision authorizing an award of attorney’s fees to the prevailing party in a sanctions motion, and at least one court has held that such an award would be improper.⁶² This anomalous lack of authority for an attorney’s fees in Rule 37(e) seems like an oversight, and may be corrected by the Advisory Committee or the courts over time.

‘forecloses reliance on inherent authority or state law to determine when certain measures should be used’ to address spoliation of electronically stored information.”).

58. *Cohn v. Guaranteed Rate, Inc.*, 318 F.R.D. 350, 353–54 (N.D. Ill. 2016) (“Rule 37(e) describes some of the remedies that a court may order in the event that electronically stored information is destroyed The Court also has broad, inherent power to impose sanctions for failure to produce discovery and for destruction of evidence, over and above the provisions of the Federal Rules.”); *CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 498 (S.D.N.Y. 2016) (“Where exercise of inherent power is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could address the same issue.”). *See also Helget v. City of Hays, Kan.*, 844 F.3d 1216, 1225–26 (10th Cir. 2017) (discussing pre-amendment case law instead of Rule 37(e) for failure to preserve internet-usage and email history).

59. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment (Rule 37(e) “authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used.”).

60. *See Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1056 (9th Cir. 1998).

61. Rule 37(a)(5) provides for an award of attorney’s fees to the prevailing party on a motion to compel and Rule 37(b)(2)(B) provides for an award of attorney’s fees to the prevailing party on a motion for sanctions for failure to comply with a court order. Rules 37(c)(1)(C) and 37(d)(3) incorporate the sanctions from Rule 37(b).

62. *See Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, No. 5:14–CV–5262, 2017 WL 239341, at *2 (W.D. Ark. Jan. 19, 2017).

Second, the prerequisites in Rule 37(e) may create an unintended opening for parties to avoid the consequences of their improper conduct. In *Marquette Transportation Company Gulf Island, LLC v. Chembulk Westport M/V*, the plaintiff claimed that the defendant operated its vessel at excessive speed, causing the plaintiff's vessel to flood and capsize.⁶³ In discovery, the plaintiff sought a copy of the data from the defendant vessel's Voyage Data Recorder, or VDR.⁶⁴ The defendant produced a thumb drive that did not contain audio or radar data from the time of the incident. The defendant refused to allow the plaintiff's expert to download the vessel's VDR data, but the court ordered the download.⁶⁵ The plaintiff's expert opined that data had been deleted deliberately. During depositions, the plaintiff learned that a DVD had been created containing all the data from the VDR, and the plaintiff pursued, and eventually obtained, a copy of the DVD.⁶⁶ The plaintiff then sought sanctions for the defendant's conduct. Despite evidence potentially establishing an intent to affect the litigation, the court found that sanctions were unavailable under Rule 37(e). Before any sanctions may be awarded, the court reasoned, the moving party must demonstrate that the ESI cannot be "restored or replaced."⁶⁷ Because the plaintiff ultimately obtained a copy of the missing data, it could not satisfy this prerequisite for sanctions under Rule 37(e).⁶⁸

Judge Roby's construction of Rule 37(e) in *Marquette* seems faithful to the language of the Rule. At the same time, it creates a perverse incentive to spoliage unhelpful ESI, then to retrieve it from a backup server if sanctions appear to be forthcoming, and thereby avoid the sanctions.⁶⁹ Rule 37(e) should not excuse a party from spoliation sanctions simply because the party, upon being caught, somehow "finds" a copy of the previously lost ESI, and the Advisory Committee or the courts should close this loophole.

Finally, another open question involves the application of proportionality to spoliation sanctions. Although the Advisory Committee Notes express an intent to have proportionality factor into

63. No. 13-6216 c/w 14-2071, 2016 WL 930946 (E.D. La. Mar. 11, 2016).

64. *Id.* at *1.

65. *Id.*

66. *Id.*

67. *Id.* at *3.

68. *Id.*

69. Of course, a deliberate exercise of this strategy might trigger other forms of sanction, such as a sanction for violating the signature certification in Rule 26(g). The availability of such sanctions depends on the circumstances, but does not alter the fact that Rule 37(e) likely has an unintended loophole.

the Rule 37(e) analysis,⁷⁰ Rule 37(e) does not expressly use the term. The most likely avenue for introduction of proportionality lies in the prerequisite requiring that the spoliating party have failed to take “reasonable” steps to preserve the ESI. Courts might evaluate the reasonableness of the steps taken under the proportionality factors in Rule 26(b)(1). This concept has not yet found its way into the courts’ analysis at an explicit level.⁷¹

C. The Spoliation Assessment

Along with the proportionality amendment, the new ESI spoliation provision in Rule 37(e) has effected the greatest change in federal civil litigation among the 2015 amendments. The amendment set out to address the inconsistency among the courts in the standard for spoliation sanctions, and—with the exception of a few quirks in the case law that will likely resolve over time—Rule 37(e) accomplishes that objective. Furthermore, it appears to have done so in a manner that changed the standard for spoliation sanctions, but not the frequency with which parties sought, or the courts awarded, those sanctions.⁷²

While successful in setting a single national standard, the amendment contains some gaps and ambiguities that the Supreme Court should address by further refining the amendment. Although the amendment accomplishes uniformity of sanctions for spoliation of ESI, it makes no sense to have two different sets of

70. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment (“Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients’ information systems and digital data—including social media—to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.”).

71. In *FTC v. DirectTV Inc.*, No. 15-cv-01129-HSG (MEJ), 2016 WL 7386133, at *5 (N.D. Cal. Dec. 21, 2016), the court’s opinion might be read to suggest that matter that is not proportional need not be preserved. That approach seems misguided. The duty to preserve is determined by the applicable body of law, and may not include a proportionality component. The requirement to take reasonable steps to preserve relevant matter seems like a much more logical place to introduce proportionality considerations.

72. Of course, the question of whether the standard in Rule 37(e), requiring specific intent for the most severe sanctions and limiting other sanctions to those necessary to cure any prejudice caused by the spoliation, is open to debate. The lower threshold set by the Court of Appeals for the Second Circuit in *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), allowing adverse inference or case-concluding sanctions based on ordinary negligence, was a minority viewpoint that the Advisory Committee and Supreme Court explicitly rejected. Regardless of one’s view of the appropriate threshold, however, a uniform standard is appropriate across the federal courts.

spoliation rules for ESI and other types of evidence. It is frequently the case that documents exist in both paper and electronic format. Under the current framework, if a party failed to preserve both, the court might need to conduct two different sanctions analyses and might be compelled to impose two different sets of sanctions. Not only would that exercise be wasteful, it could introduce confusion to the jury as well—the jury might, for example, be instructed to presume that the paper copy contained information harmful to the spoliating party, but not to make the same presumption for the electronic copy. Additionally, Rule 37(e) should contain an attorney’s fees provision, and arguably a meet and confer requirement, like the other sanctions provisions in Rule 37. Finally, the Rule might be improved by some thoughtful language regarding the burden of proof and potential role of the jury in the factual aspects of the Rule 37(e) analysis.

The spoliation sanctions amendment does not directly address any of the three Duke Conference core needs of proportionality, cooperation, and active judicial case management (although one could argue that it tangentially advances proportionality). Thus, while the 2015 amendment to Rule 37(e) successfully accomplished the important objective of creating a uniform national standard, it did not materially advance any of the three core deficits of the civil litigation system.

IV. COOPERATION—RULE 1

A. The Data

Rule 1 contains the iconic, and largely aspirational, language requiring that the rules be construed to secure the “just, speedy, and inexpensive determination of every action and proceeding.”⁷³ The amendment expressly extends that duty to the parties, whereas the prior language could be read to apply only to the courts. The amendment to Rule 1 was the Advisory Committee’s primary attempt to foster greater cooperation, and scholars have criticized this amendment as unlikely to have any material effect.⁷⁴

In the first year following the 2015 amendments’ effectiveness, courts discussed amended Rule 1 in 432 cases. In the majority, the court either mentioned the rule in general background (e.g.,

73. FED. R. CIV. P. 1.

74. See Bennett, *supra* note 5, at 1313.

“Summary judgment is not a disfavored remedy, See Rule 1”) ⁷⁵ or admonished the parties to be mindful of Rule 1’s strictures going forward. ⁷⁶ In 177 cases (41%), however, the court included Rule 1 among the grounds supporting its ruling on issues like whether to grant requests for extensions of time. ⁷⁷ By comparison, courts discussed Rule 1 389 times in the comparison year prior to the amendments’ effective date, and based their rulings on Rule 1 in 161 (41%) of those cases. Thus, courts invoked Rule 1 more frequently post-amendment than they did before the amendment, but the difference is small enough as to be likely meaningless.

B. The Cooperation Judicial Gloss

The Advisory Committee Note accompanying the 2015 amendment to Rule 1 is quite short—consisting of two spare paragraphs—and does not illuminate much about the Committee’s thought processes. The Note does suggest that the amendment, by adding an express reference to the parties’ obligations to construe the rules to achieve the just, speedy, and inexpensive resolution of matters, was designed to foster greater cooperation. ⁷⁸ As discussed above, the data do not show any significant numerical increase in the application of Rule 1. Moreover, it is difficult to discern any evidence of increased cooperation in the reported opinions discussing Rule 1. ⁷⁹

75. See, e.g., *Krajcsik v. Ramsey*, No. MJG–15–3708, 2017 WL 3868560, at *2 (D. Md. Sept. 5, 2017) (“When evaluating a motion for summary judgment, the Court must bear in mind that the ‘summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.’” (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (quoting Rule 1 of the Federal Rules of Civil Procedure))).

76. See, e.g., *United States ex rel. Feaster v. Dopps Chiropractic Clinic, LLC*, No. 13–cv–1453–EFM–KGG, 2016 WL 6462041, at *6 (D. Kan. Nov. 1, 2016); *Scranton Products, Inc. v. Bobrick Washroom Equip., Inc.*, 190 F. Supp. 3d 419, 427 (M.D. Pa. 2016).

77. See, e.g., *Vanderklok v. United States*, No. 15–00370, 2016 WL 1720449, at *2 (E.D. Pa. Apr. 29, 2016).

78. FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment (“Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.”).

79. Obviously, issues tend to come before the court when the parties are not cooperating and the process is not running smoothly—that is when parties tend to file motions and the courts tend to issue opinions. Thus, it is not surprising that the vast majority of opinions that discuss whether the parties are complying with Rule 1 criticize one of the parties—or both parties—for failing to uphold the spirit of Rule 1. The lack of any meaningful change in the number of these cases is strong evidence that the parties have not, as a result of the 2015 amendment to Rule 1, suddenly started “playing well together.” The research

Although the Rule 1 opinions do not demonstrate increased cooperation, they do contain some noteworthy jurisprudence. The Advisory Committee Notes explicitly state that the amendment to Rule 1 does not create a new basis for sanctions; a party cannot file a successful motion asking the court to sanction an opposing party because the opposing party is applying the rules in a manner that causes delay or unnecessary costs in violation of Rule 1.⁸⁰

The natural question, then, is not whether parties have started seeking sanctions under Rule 1—in direct contravention of the Committee Note—but whether they are using violations of Rule 1 to support motions for sanctions under other sanctioning authority.⁸¹ The case law reflects that both parties and the courts are citing violations of Rule 1 as support for sanctions under another rule. For example, courts are regularly citing conduct inconsistent with Rule 1—such as discovery conduct that causes delay or drives up the cost of litigation—as part of the basis for their decisions to impose sanctions under Rule 37.⁸² Likewise, the failure to uphold the goals of Rule 1 has been cited as part of the basis for an award of sanctions under the court's contempt power in 18 U.S.C. § 401,⁸³

for this article did not uncover any instances of the court praising the parties for their newfound cooperative spirit.

80. FED. R. CIV. P. 1 advisory committee's note to 2015 amendment ("This amendment does not create a new or independent source of sanctions.").

81. The Advisory Committee Note suggests that such a tactic is not improper. FED. R. CIV. P. 1 advisory committee's note to 2015 amendment (explaining that while the amendment does not create a new sanctioning authority, "neither does it abridge the scope of any other of these rules.").

82. See, e.g., *Sec. & Exch. Comm'n v. Wu*, No. 11-cv-04988-JSW, 2016 WL 4943000, at *2 (N.D. Cal. Sept. 16, 2016) (citing Rule 1 violations as supporting "termination sanctions" under Rule 37). See also *Century Sur. Co. v. Nafel*, No. 3:14-CV-00101-JWD-EWD, 2016 WL 4059678, at *9 (M.D. La. July 28, 2016) (holding that with Rule 1's objectives "so firmly embedded in the Rules . . . this Court must find that [the defendant] contravened his discovery obligations, triggering Rule 37."); *Hardy v. GlobalOptions Servs., Inc.*, No. 2:14-cv-00513-APG-CWH, 2016 WL 4154943, at *2 (D. Nev. July 15, 2016) (listing Rule 1 as a basis for sanctions under Rules 16 and 37); *Thomas v. FTS USA, LLC*, No. 3:13cv825, 2016 WL 3566657, at *12 (E.D. Va. June 24, 2016) (listing Rule 1 violations as a basis for sanctions under Rule 37); *Greene v. Wal-Mart Stores, Inc.*, No. 2:15-cv-00677-JAD-NJK, 2016 WL 829981, at *5 (D. Nev. Jan. 26, 2016) ("As the text of Rule 1 now makes explicit, the duty to strive toward that goal is shared by the Court and the parties. It is with that charge as a guide that courts construe and administer the Rules. There are several mechanisms by which this goal can be accomplished, including entering case-dispositive sanctions against a party who fails to comply with the Rules or unnecessarily multiplies the proceedings.") (citations omitted).

83. *N. States Power Co. agent of Xcel Energy v. TriVis, Inc.*, No. 16-51 (DSD/BRT), 2016 WL 2621953, at *5 (D. Min. May 6, 2016).

an award of attorney's fees,⁸⁴ involuntary dismissal under Rule 41(b),⁸⁵ and the court's decision to award Rule 11 sanctions.⁸⁶

Conversely, courts also use Rule 1 regularly to excuse minor transgressions of other rules. So, for example, in *AK Steel Corporation v. PAC Operating Limited Partnership*, the court based its decision to overlook a party's failure to seek leave to amend a pleading on Rule 1 considerations.⁸⁷ Likewise, in *In re: Ex Parte Application of Pro-Sys Consultants and Neil Godfrey*, the court allowed an alternate form of service of a subpoena to advance the Rule 1 interests.⁸⁸

Finally, the indicia that proportionality has gained traction in the courts as a result of the 2015 amendments extends to Rule 1. The Advisory Committee Note to Rule 1 suggests its tie to proportionality,⁸⁹ and the courts are starting to pair the two concepts. For example, in *Hyatt v. Rock*, the court described the standard in Rule 1 as "enveloping the interpretation of Rule 26."⁹⁰

C. The Cooperation Assessment

Chief Justice Roberts described the amendment to Rule 1 as expanding the scope of the rule by "a mere eight words" but characterized those as "words that judges and practitioners must take to heart."⁹¹ Whereas the proportionality and spoliation amendments seem to have achieved meaningful change, there is not yet any evidence that either judges or practitioners have "taken to heart" the new obligations in Rule 1. The courts pay some lip service to the amendment in their opinions, but the data does not suggest that the parties or the courts are invoking or applying Rule 1 in a meaningfully different manner.

84. *Joe Hand Promotions, Inc. v. Tickle*, No. 4:12-cv-01874, 2016 WL 393797, at *10 (M.D. Pa. Feb. 2, 2016).

85. *Kost v. Hunt*, No. 13-cv-583 (JNE/TNL), 2016 WL 5539768, at *4 (D. Min. Aug. 11, 2016).

86. *Keister v. PPL Corp.*, 318 F.R.D. 247, 258 (M.D. Pa. 2015).

87. No. 15-9260-CM-GEB, 2016 WL 6163832, at *5 (D. Kan. Oct. 24, 2016) ("In direct contravention of Rule 1's directive to 'secure the just, speedy, and inexpensive determination' of this proceeding, a motion for leave would frankly only add to the cost and delay of the case.").

88. No. 16-mc-80118-JSC, 2016 WL 6025155, at *2 (N.D. Cal. Oct. 14, 2016).

89. FED. R. CIV. P. 1 advisory committee's note to 2015 amendment ("Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.").

90. No. 9:15-CV-0089 (DNH/DJS), 2016 WL 6820378, at *2 (N.D.N.Y. Nov. 18, 2016). See also *Waters v. Drake*, No. 2:14-cv-1704, 2016 WL 4264350, at *17 (S.D. Ohio Aug. 12, 2016) (discussing the interplay between Rules 1 and 26(b)(1) in a "Prefatory Statement").

91. C.J. ROBERTS, JR., *supra* note 36, at 5–6.

With regard to the Duke Conference core needs of proportionality, cooperation, and active judicial case management, the amendment to Rule 1 is the closest the amendments come to promoting greater cooperation. Although this section uses the term “cooperation” in its title and discussion, however, Rule 1 does not even use the word “cooperation,” much less attempt to mandate cooperation. Rather, Rule 1 as amended and applied appears to impose an obligation on each party separately and independently to employ the rules to obtain the just, speedy, and inexpensive determination of each action. Thus far, there is no evidence that the amendment to Rule 1 has created a greater spirit of cooperation, although that might admittedly be difficult to tease out of reported opinions.

V. DISCOVERY COST-SHIFTING—RULE 26(C)(1)(B)

Another concern regarding the 2015 amendments pertained to the authorization to shift the costs of responding to discovery from the responding party to the requesting party. Although the default has always been that the responding party bears the cost of responding to discovery requests, the courts have long had the inherent authority to shift those costs to the requesting party,⁹² and the 2015 amendment simply codified that judge-made rule. Scholars and other stakeholders worried that this new express authority would result in cost-shifting becoming the norm, limiting access to information for parties with limited resources.⁹³

A. *The Data*

Cost-shifting certainly has not become the norm in the first year of explicit authority in Rule 26(c)(1)(B). Only three decisions have adjudicated a motion seeking a protective order shifting discovery costs under the amended rule, with one court granting the motion.⁹⁴ At the same time, that is three more motions than were filed in the year prior to the 2015 amendments; not a single case adjudicated a fee-shifting protective order request in 2015.

92. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

93. Judge Shira A. Scheindlin from the Southern District of New York submitted a comment stating that the new rule, in combination with Rule 26(b)(2)(B), “may encourage courts to adopt a practice of requiring parties to pay for the discovery they request or to do without.” She opined that fee shifting “should not become our default position.” DUKE CONFERENCE REPORT, *supra* note 11, Tab 2B, at 121.

94. See *Knapp v. Evgeros, Inc.*, No. 15 C 754, 2016 WL 2755452, at *2 (N.D. Ill. May 12, 2016).

B. The Cost-Shifting Assessment

The amendment to Rule 26(c) was billed as simply bringing the rules into alignment with the practice without changing the default condition that the responding party incurs the cost of responding to discovery, and the results so far are consistent with that objective. While it is potentially significant that the amendment prompted three requests for fee-shifting protective orders in the first year post-amendment as compared to none in the prior year, the overall effect on civil litigation thus far is minimal.

With regard to the Duke Conference core needs of proportionality, cooperation, and active judicial case management, the Supreme Court did not intend for the amendment to Rule 26(c) to address any of those core needs, and it does not in practice seem to have had any effect on any of those deficits.

VI. OFFICIAL FORMS—RULE 84

A. The Forms Judicial Gloss

Prior to December 1, 2015, Rule 84 established the official forms of the Federal Rules of Civil Procedure in one simple sentence: “The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”⁹⁵ This one sentence accomplished two important purposes: alerting judges and lawyers that the forms provided guidance as to the level of detail and complexity required in federal court papers (very low); and establishing that a court paper that followed one of the forms was deemed sufficient (and thus could not be challenged as insufficient) under the rules.⁹⁶

The 2015 amendments abrogated Rule 84 and eliminated the federal forms. Scholars have bemoaned this amendment.⁹⁷ Their criticism stems back to the Supreme Court’s revised pleading

95. FED. R. CIV. P. 84 (repealed 2015).

96. See, e.g., *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. 2007).

97. See, e.g., Brooke D. Coleman, *Abrogating Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093 (2015). Professor Coleman argues that the abrogation of Rule 84 and the forms was essentially an amendment to each of the Rules that the forms illustrate, yet without publication and public comment. Professor Coleman uses Rule 8 and Form 11 as an example. Form 11 was, arguably, the impetus for abrogating Rule 84 and the forms. Form 11 contains a very simple negligence complaint, which most scholars would agree falls short of the plausibility standard established by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Eliminating Form 11, Coleman argues, was effectively amending the pleading standard in Rule 8, but without following the procedures under the Rules Enabling Act. Coleman, *supra*.

standard announced in *Twombly*⁹⁸ and confirmed in *Iqbal*.⁹⁹ Those cases, the argument runs, altered the pleading standard in Rule 8 without subjecting the revisions to the amendment process, in violation of the Rules Enabling Act.¹⁰⁰ That new pleading standard requires that pleadings contain enough factual allegations to establish that each element of each claim is “plausible.”¹⁰¹ Form 11 contains an extremely bare bones negligence complaint, lacking virtually any factual content, and most commentators agree that Form 11 would not satisfy the plausibility standard.¹⁰² Rather than attempt to fix Form 11, the Supreme Court opted to do away with the official forms altogether.¹⁰³

Accordingly, since Rule 84 has been abrogated, there are no longer any opinions applying Rule 84 post amendments (and thus no comparison data). Even while Rule 84 was in effect, however, courts did not frequently apply the Rule—indeed, if anything they discuss it slightly more in absentia. Courts have referenced the abrogation of Rule 84 fourteen times in the first year post-amendment, whereas they cited Rule 84 in the comparison period thirteen times.

The most frequently cited form, both in the year before the abrogation of Rule 84 and in the year following, is Form 18 for patent complaints.¹⁰⁴ Prior to the abrogation of Rule 84, many courts held that a direct infringement patent complaint was sufficient if it complied with Form 18, without subjecting it to a rigorous *Twombly/Iqbal* analysis.¹⁰⁵ After the abrogation, many courts have held that Form 18 no longer figures into the analysis.¹⁰⁶ However, at least one court has held that the abrogation of Rule 84 should not change the standard for evaluating a direct patent

98. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

99. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

100. 28 U.S.C. § 2072. See Nathan R. Sellers, Note, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 330 (2011).

101. *Iqbal*, 556 U.S. 662.

102. See, e.g., Sellers, *supra* note 100, at 372.

103. *Id.* at 373.

104. See, e.g., *Robern, Inc. v. Glasscrafters, Inc.*, 206 F. Supp. 3d 1005, 1008–09 (D.N.J. 2016).

105. See, e.g., *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1334 (Fed. Cir. 2012) (holding that, to the extent “*Twombly* and its progeny conflict with the Forms and create differing pleading requirements, the Forms control.”); *Arthrex, Inc. v. W. Coast Med. Res., LLC*, No. 8:15-cv-910-EAK-MAP, 2015 WL 12844946, at *2–3 (M.D. Fla. Nov. 25, 2015); *Rosetta-Wireless Corp. v. Apple Inc.*, No. 15 C 799, 2015 WL 6955492, at *3 (N.D. Ill. Nov. 10, 2015).

106. See, e.g., *Disc Disease Sols., Inc. v. VGH Sols., Inc.*, No. 1:15-cv-188 (LJA), 2016 WL 6561566, at *1 (M.D. Ga. 2016); *e.Digital Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 WL 4427209, at *2–3 (N.D. Cal. Aug. 22, 2016).

infringement complaint because the Advisory Committee Notes specifically state that the abrogation was not intended to change the pleading standards.¹⁰⁷

B. The Forms Assessment

Chief Justice Roberts did not particularly elucidate the objectives of Rule 84's abrogation. He opined that many of the forms have become "antiquated or obsolete," but did not offer any reason as to why the Court opted to eliminate the forms rather than modernize them.¹⁰⁸ Leaving aside the wisdom, and even legality, of abrogating the forms, the amendment abrogating Rule 84 certainly accomplished the stated objective of eliminating the forms. As the split in authority illustrates, however, the possibility exists that the effects of the forms live on.

With regard to the Duke Conference core needs of proportionality, cooperation, and active judicial case management, as with the amendment to Rule 26(c), the Supreme Court did not intend for the abrogation of Rule 84 to cause any substantive changes, and it does not in practice seem to have had any effect on any of those deficits.

VII. PRODUCTION REQUESTS—RULE 34

Some of the revisions to Rule 34 are among the most profound changes in the 2015 amendments, but they have received far less attention from scholars and the other stakeholders. Because the amended provisions are entirely new, there is no empirical basis for a "before and after" comparison. The opinions applying amended Rule 34, however, do raise some interesting issues.

A. The Document Requests Judicial Gloss

The Rule 34 amendment with the greatest potential impact is the new requirement that parties who interpose objections to a production request state whether they are withholding any documents on the basis of the objection.¹⁰⁹ The purpose of the provision is to allow the requesting party to make a more informed decision regarding whether to challenge the objection—the request-

107. See *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 14-cv-0772-GMN-NJK, 2016 WL 199417, at *2 n.1 (D. Nev. Jan. 15, 2016).

108. C.J. ROBERTS, JR., *supra* note 36, at 8–9.

109. FED. R. CIV. P. 34(b)(2)(c) ("An objection must state whether any responsive materials are being withheld on the basis of that objection.").

ing party would be more likely to forgo a challenge if the responding party did not withhold any documents based on the objection (conserving the parties' and the courts' resources).¹¹⁰

The new provision makes eminent sense, but compliance could prove problematic in some circumstances. For example, if a term in a document request is vague or ambiguous, a responding party might have great difficulty in determining whether it has any documents meeting the various alternative meanings of the term that it is not producing.

The courts have yet to wrestle with this particular problem in a reported opinion, but they have repeatedly addressed motions asserting that a party has failed to comply with the requirement to disclose whether documents have been withheld. In the first year of the amendment's effectiveness, courts issued sixteen opinions discussing the requirement. Initially, the courts were lenient—likely because of the newness of the provision—and simply ordered the responding party to supplement its response to comply with the new Rule with no other sanction.¹¹¹ More recently, however, courts have started to sanction parties who fail to comply.¹¹²

The manner in which parties must describe the documents they are withholding on the basis of their objections is not explicitly articulated in Rule 34(b)(2)(C). The Advisory Committee Note suggests that a log, akin to a privilege log, is not required, and that a statement describing limitations in the search used to collect responsive documents is adequate.¹¹³ Thus far, courts seem to be adhering to the Committee's suggested construction of the Rule.¹¹⁴

110. FED. R. CIV. P. 34 advisory committee's note to 2015 amendment ("This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections.").

111. See, e.g., *Scranton Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 190 F. Supp. 3d 419, 437–38 (M.D. Pa. 2016); *Douglas v. Kohl's Dep't Stores, Inc.*, No. 6:15-cv-1185-Orl-22TBS, 2016 WL 1637277, at *3–4 (M.D. Fla. Apr. 25, 2016).

112. See *Asphalt Paving Sys., Inc. v. Gen. Combustion Corp.*, No. 6:15-cv-49-Orl-41TBS, 2016 WL 3167712, at *2 (M.D. Fla. June 7, 2016) (awarding attorney's fees against the party failing to specify whether it withheld documents in its response).

113. FED. R. CIV. P. 34 advisory committee's note to 2015 amendment ("The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld.'").

114. See *Rowan v. Sunflower Elec. Power Corp.*, No. 15-cv-9227-JWL-TJJ, 2016 WL 3743102, at *5 (D. Kan. July 13, 2016) ("An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld.'").

The 2015 amendment to Rule 34 also introduced language requiring parties to state objections with specificity, eliminating an unintended incongruity with the requirement in Rule 33 that objections to interrogatories be stated with specificity.¹¹⁵ Opinions applying this new requirement for specificity in objections have cast doubt about the continued viability of “general objections.”

A common practice in responding to written discovery is to include a set of “general objections” at the beginning of the response, in addition to the objections to specific discovery requests.¹¹⁶ In the general objections, the responding party might object to any improper instructions or definitions in the discovery request, and might object to any broad, thematic aspects of the requests.¹¹⁷

Following the enactment of the 2015 amendments, parties have challenged general objections. These challenges assail the generic concept of general objections, not the particular general objections raised in their opponents’ discovery responses.¹¹⁸ These movants have argued that a general objection fails, by its nature, to comply with the specificity requirement in Rule 34(b)(2)(B), which requires that a responding party state with specificity the objections for “each item or category.”¹¹⁹ Some courts have been persuaded, holding general objections categorically insufficient.¹²⁰ Other courts have stopped short of a categorical prohibition on general

115. FED. R. CIV. P. 34 advisory committee’s note to 2015 amendment (“Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34.”).

116. *See Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 538–39 (D. Kan. 2016).

117. *See id.*

118. *See Meredith v. United Collection Bureau, Inc.*, No. 1:16 CV 1102, 2016 WL 6649279, at *2 (N.D. Ohio Nov. 10, 2016) (noting that the plaintiff had requested that the court deem all general objections waived).

119. *See id.*

120. *See, e.g., Nkansah v. Martinez*, No. 15–646–JWD–RLB, 2016 WL 6595921, at *3 n.1 (M.D. La. Nov. 7, 2016) (“Pursuant to Rule 34(b)(2)(B) of the Federal Rules of Civil Procedure, any objection must ‘state with specificity the grounds for objecting to the request, including the reasons.’ Any general objection presumably applicable to all discovery requests, that fails to comply with Rule 34, is insufficient and will not be considered by the Court.”); *Auburn Sales, Inc. v. Cypros Trading & Shipping, Inc.*, No. 14–cv–10922, 2016 WL 3418554, at *3 (E.D. Mich. June 22, 2016) (holding that general objections do not satisfy the requirement that, “[f]or each item or category” the response state objections with specificity; with general objections it is unclear as to which requests the defendants objected and as to which they produced documents); *Asphalt Paving Sys., Inc. v. Gen. Combustion Corp.*, No. 6:15–cv–49–Orl–41TBS, 2016 WL 3167712, at *2 (M.D. Fla. June 7, 2016) (“Federal Rule of Civil Procedure 34(b)(2)(B) provides that objections to requests for production shall ‘state with specificity the grounds for objection to the request, including the reasons.’ The Court does not consider frivolous, conclusory, general, or boilerplate objections.”).

objections, and analyze the objections individually under the new specificity requirement.¹²¹

Further doubt regarding the continuing viability of general objections arises when the requirement to state whether documents are being withheld on the basis of the objections is considered. Because general objections speak to problems with the set of requests as a whole, rather than problems with an individual request, the obligation to state whether the responding party is withholding documents on the basis of the general objections is awkward. For example, general objections are often where a responding party might object to any general definitions in the requests. Determining whether the responding party is withholding any documents on the basis of an objection to a vague definition would entail not only considering the wording of the definition, but also every individual request that uses the vaguely defined term, then conducting a search for documents that might be responsive to any of the alternative meanings of the vague term.

Another typical general objection states that the responding party objects to the instructions in the request to the extent that they purport to impose greater obligations than those set forth in the Federal Rules of Civil Procedure. Similarly, parties often interpose a general objection “to the extent that the requests seek documents outside the scope of discovery in Rule 26(b)(1).” It is not readily apparent how parties are to assess whether they are withholding documents as a result of general objections like these. Thus far, the courts have not directly confronted this issue, and the Advisory Committee Notes do not address it either.

While the 2015 amendment brought objections to Rule 34 document requests into alignment with objections to Rule 33 interrogatories in terms of the specificity requirement, the amendment left a related inconsistency in place. Rule 33 expressly provides that “[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.”¹²² Amended Rule 34, curiously, does not contain a parallel waiver provision. So far, the courts disagree as to whether this difference means that parties do not waive objections to document requests if they fail to assert them timely.¹²³

121. See *Meredith*, 2016 WL 6649279, at *2 (declining to deem general objections waived).

122. FED. R. CIV. P. 33(b)(4).

123. Compare 17 Outlets, LLC Healthy Food Corp. v. ThurKen III, LLC, No. 15-cv-101-JD, 2016 WL 6781217, at *2 (D.N.H. Nov. 16, 2016) (“Unlike Federal Rule of Civil Procedure 33, which governs interrogatories, Rule 34 does not include a waiver provision [T]he sanction of waiver is reserved for cases ‘where the offending party committed unjusti-

The 2015 amendments also changed Rule 34 to allow for early service of document requests (in advance of the Rule 26(f) discovery conference)¹²⁴ and to allow the responding party to simply produce responsive documents instead of making them available for inspection.¹²⁵ These changes are appearing in the reported opinions, but not in a way that is surprising or controversial.

B. The Document Requests Assessment

Curiously, Chief Justice Roberts did not even reference the amendments to the document request provisions in Rule 34 in his annual update. While the amendments to Rule 34 may not be as controversial as some of the other amendments, they have the potential to improve the litigation process meaningfully.

The process in which parties can serve document requests before they conduct their Rule 26(f) discovery conference and interact with the court regarding the initial case management order, if implemented in good faith and in the spirit embodied in Rule 1, should make the litigation process flow more efficiently and proportionally. Likewise, the requirement to disclose whether the responding party is withholding documents on the basis of any objections, now stated with specificity, should result in better decisions by the requesting party regarding challenging the objections. As the judicial gloss section above illustrates, however, the amended language leaves some uncertainty that has caused the courts to struggle and, at times, to reach inconsistent decisions. Accordingly, these provisions should be more and more successful as the courts or further amendments refine the Rule.

With regard to the Duke Conference core needs of proportionality, cooperation, and active judicial case management, the amendments to Rule 34 do not directly address any of these needs. They primarily promote greater transparency in the objection process, leading to a more informed decision regarding whether to challenge objections. That is a sensible objective, and should lead to more cost-effective discovery, but does not really promote proportionality in discovery. The new opportunity to serve early document requests might foster greater cooperation if it leads parties to work together to solve document production issues, rather than merely enabling them to bring their disputes to the judge sooner.

fied delay in responding to discovery.”), *with* *Sheets v. Villas*, No. 8:15-cv-1674-T-30JSS, 2016 WL 6584877, at *2 (M.D. Fla. Nov. 7, 2016) (finding waiver).

124. FED. R. CIV. P. 26(d)(2) & 34(b)(2)(A).

125. FED. R. CIV. P. 34(b)(2)(B).

In any event, the amendments to Rule 34 do not directly advance any of the core needs.

VIII. CONCLUSION

The sections above measure individual rule amendments against their stated objectives. With the exception of the amendment to Rule 1, the other amendments seem to be achieving their goals. Parties and courts are injecting proportionality into the discovery mix more vigorously. Courts are generally using a uniform standard when considering sanctions for spoliation of ESI. Courts are requiring parties to assert their objections to document requests with specificity, and are requiring them to declare whether they are withholding documents on the basis of their objections. These individual amendments are the trees, and they seem to be growing as envisioned when they were planted, save for a branch here and there sprouting in an unanticipated direction.

But what about the forest? Are the 2015 amendments achieving their “big picture” objectives, as articulated at the Duke Conference? Are they promoting “cooperation and proportionality [and] sustained, active, hands-on judicial case management?” At the forest level, the success of the 2015 amendments is less clear.

The collective data and the individual opinions suggest that, at least over the first year, the 2015 amendments have quite successfully fertilized the growth of proportionality. It is unlikely that even the most rabid supporter of these amendments would have predicted that the courts would be applying Rule 26(b)(1) to limit discovery they viewed as disproportional more than four times more frequently in this first year post-amendments. The Advisory Committee and the Supreme Court can certainly check the proportionality box.

To cultivate more cooperation, the Committee added an advisory phrase to Rule 1 that does not use the word “cooperation,” specifying explicitly that those who resist this advisement may not be sanctioned as a result. Professor Mark Bennett’s reaction to this impotent measure was to quote tennis legend John McEnroe: “YOU CANNOT BE SERIOUS.”¹²⁶ Although cooperation is difficult to quantify, and may be extremely difficult to mandate and monitor, neither the collective data nor the individual opinions reflect any change in the level of cooperation. Perhaps an attitude

126. See Bennett, *supra* note 5, at 1313.

adjustment of this nature takes more than one year to manifest, but based on the evidence currently available, the 2015 amendments have thus far failed to foster an observable spirit of greater cooperation.

To compel more active judicial case management, the Committee did . . . virtually nothing. While greater judicial management is easy to legislate (in contrast to greater cooperation between adversaries), the Advisory Committee and the Supreme Court opted to encourage, rather than require, judges to actively manage their cases. For example, Rule 16 makes it optional for a judge to meet with the parties prior to issuing the initial case management order.¹²⁷ Judges only conduct such conferences 45% of the time.¹²⁸ Thus, in over half the cases, the judge sets the time periods, limits, and other parameters for discovery without even meeting with the parties. Rule 16 could easily be amended to mandate such conferences, but the Supreme Court has thus far resisted such a mandate. Reported opinions yield no hint that judges are heeding the Supreme Court's encouragement to actively manage cases. For those who believe that "sustained, active, hands-on judicial case management" is the one true *sine qua non* for material improvement in the federal civil litigation system, this was an opportunity lost.¹²⁹

Meaningful change takes time, and often requires more than one attempt. While the Advisory Committee and the Supreme Court may eventually succeed in promoting greater cooperation

127. FED. R. CIV. P. 16(b)(1).

128. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 13 (2009).

129. The Committee has been encouraging active case management since at least 1983, but the data suggest that judges have resisted changing their traditional roles. See Richard L. Marcus, *Slouching Towards Discretion*, 78 NOTRE DAME L. REV. 1561, 1588 (2003) ("Beginning in 1983, Rule 16 was amended to require case management activity by all judges in most cases, and to encourage more managerial activity than was required."); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1984–87 (1989) (describing the history of Rule 16 and the purposes of the 1983 amendment). Amending the rules to mandate a more active role for judges may be the only way to change most judges' behavior, and the present litigation climate makes the need for managerial judges more compelling. Not only is there a rare consensus among parties on "both sides of the v" that the process benefits from such active judges, the current decline in jury trials has diminished the historic primary role of judges. See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 34–36 (2003); Victor Eugene Flango, *Judicial Roles for Modern Courts*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/sitecore/content/microsites/future-trends-2013/home/Monthly-Trends-Articles/Judicial-Roles-for-Modern-Courts.aspx> (last visited Sept. 7, 2017) ("Yet we all have a conception of what a judge should be—a distinguished person presiding over a trial.").

and active judicial case management, the early returns suggest that they have more work to do.

Why did the amendments appear to have succeeded in fostering more robust application of the proportionality doctrine but not in promoting cooperation or active judicial case management? One factor may be the Supreme Court's willingness to be more directive in its amendments regarding proportionality; the Supreme Court may be reluctant to direct the lower court judges as to how to manage their dockets. Another less obvious one, though, might be marketing. Because Chief Justice Roberts emphasized and urged proportionality in his annual report discussing the 2015 amendments, district court judges were primed to consider the issue, as evidenced by numerous lower court opinions quoting his report in their discussions of proportionality.¹³⁰

The amendment process is designed such that the Advisory Committee prepares draft amendments, publishes them for public comment, responds to the public comments, and then submits them to the Supreme Court along with Advisory Committee Notes.¹³¹ Judges and lawyers then rely on that record, and in particular the Advisory Committee Notes, to construe the amendments. In the case of the 2015 amendments, however, lower court judges have relied heavily on Justice Roberts's annual report—a document external to the “legislative history” of the amendments. Whether this degree and type of influence by one individual is appropriate warrants careful consideration.

130. See, e.g., *United States v. Talmage*, No. 1:16-cv-19-DN-PMW, 2017 WL 1047315, at * 2 (D. Utah Mar. 17, 2017); *Meswain v. United States*, No. 2:15-cv-01321-GMN-GWF, 2016 WL 4530461, at *3 (D. Nev. Aug. 30, 2016); *Grober v. Mako Prod. Inc.*, No. 2:04 CV 8604 JZ (DTBx), 2016 WL 7429139, at *1 (C.D. Cal. Aug. 9, 2016).

131. See STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, *FEDERAL CIVIL RULES HANDBOOK*, Pt. I, 2–5 (2017 ed.).